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IN THE
Supreme Court of the United States

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,
Petitioner,

v.

WILLIAM H. SORRELL, AS ATTORNEY GENERAL OF THE STATE OF VERMONT, SCOTT JOHNSTONE, AS SECRETARY, VERMONT AGENCY OF NATURAL RESOURCES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE ELECTRONIC INDUSTRIES ALLIANCE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Electronic Industries Alliance ("EIA") and the National Association of Manufacturers ("NAM") respectfully submit this brief as *amici curiae* in support of the petition.[1]

[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party to this dispute authored this brief in whole or in part

The Electronic Industries Alliance (EIA) is an alliance of six electronic and high technology associations. These associations include the Consumer Electronics Association (CEA), the Telecommunications Industry Association (TIA), the Government Electronics and Information Technology Association (GEIA), the Electronic Components, Assemblies and Materials Association (ECA), JEDEC—the leading developer of standards for the semiconductor industry, and the Electronic Industries Foundation, which is the philanthropic partner of EIA. Together, these associations form the premier high tech association in the world. The Alliance's mission is to promote the market development and competitiveness of the U.S. high tech industry through domestic and international policy efforts. EIA is comprised of more than 2,300 member companies whose products and services range from the smallest electronic components to the most complex systems used by defense, space and industry, including the full range of consumer electronic products. Typical products manufactured by EIA members include consumer electronics such as televisions, computers, printers, and cameras; office equipment such as printers, copiers, and network servers; telecommunication equipment, such as cell phones and satellites; and military devices such as defense equipment.

The National Association of Manufacturers ("NAM")—"18 million people who make things in America"—is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in 50

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and no person or entity, other than amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

states. NAM members produce goods in every industrial sector.

Both EIA and the NAM filed an amici curiae brief in support of Petitioner's petition for rehearing and suggestion for rehearing en banc in the court below.

The common thread that unites the *amici* is their serious concern regarding the impact of the Second Circuit's decision on the functioning of the distribution process for manufactured goods. By holding that state labeling requirements are immune from Commerce Clause scrutiny, so long as the same requirements apply to goods manufactured within the State and those manufactured outside the State, the court below has opened the door to onerous—and conflicting—state regulations that threaten to undermine the national marketplace on which manufacturers depend.

American manufacturers today produce and package their goods in plants all over the country (and indeed all over the world), with no differentiation based on the State in which a particular item will ultimately be sold. Those goods are typically moved to intermediate distribution centers, from which they are transferred to other wholesale or retail outlets throughout a multi-state area in response to demand for the product. Even at the retail level, nationwide chains often transfer goods from a retail outlet in one State to an outlet in another State in response to differences in local demand for a particular product.

Under the decision of the Second Circuit, any individual State can impose detailed labeling requirements on a particular product sold in that State, as long as it imposes the same requirement on goods produced within the State and those produced outside the State—and the court will not even consider the extent to which the labeling requirement burdens interstate commerce or whether the goals of the statute could

be met by less burdensome means. This holding opens the door to a kaleidoscope of varying (and potentially conflicting) labeling requirements, as individual state legislatures form their own judgment as to what label best advances the interests of their local citizens. But in many instances businesses will be unable to comply with such a patchwork of labeling requirements without a significant (and expensive) disruption of their production and distribution systems.

Moreover, the potential impact on the members of EIA and the NAM go far beyond state labeling laws. State and local governments enact a wide variety of laws and ordinances with which businesses must comply. Under the rationale of the Second Circuit, those laws are wholly immune from challenge under the Commerce Clause, as long as there is no discrimination between out-of-state and in-state companies—even if there are in fact no in-state companies to be affected. The potential for burdensome and disruptive state regulation, for which the members of EIA and the NAM have no recourse whatsoever, is enormous.

SUMMARY OF ARGUMENT

The unfettered freedom of states to impose state-specific labeling or packaging requirements, immune from Commerce Clause review, threatens a significant (and expensive) disruption to the production and distribution processes of manufacturers all over the world. Because of the complex distribution network through which goods typically move on their way to market, a manufacturer often has no way to ascertain at the time of production where any particular goods may ultimately be sold. To comply with state-by-state laws, such a manufacturer generally has only two options—a retooling of facilities to set up special production and distribution lines for goods destined for specific states; or the inclusion on all products, wherever

sold, of the labels required by every individual state. Both options can be highly disruptive to the efficiency of the interstate marketplace, and also add significantly to the costs of production—costs that would eventually translate into higher prices for the consumer. Moreover, placing numerous labels on a product will not always be feasible given the small size of many products.

The Second Circuit's refusal *even to consider* the burdens caused by such a law on interstate commerce unless the law discriminates between in-state and out-of-state manufacturers cannot be squared with this Court's settled Commerce Clause jurisprudence. Indeed, by its terms the *Pike* test, which requires that the burdens on interstate commerce be balanced against the claimed local benefits, comes into play only when the law at issue "regulates even-handedly" and does not discriminate against interstate commerce.

The nationwide "free market" guaranteed by the Commerce Clause is the bedrock on which this country's manufacturing industry has been able to grow and prosper. That free market is threatened by the crabbed interpretation of the Commerce Clause adopted by the Second Circuit and the other circuits identified in the Petition. By precluding any Commerce Clause challenge to state regulations, no matter how burdensome and disruptive of interstate businesses, unless the state law overtly discriminates between out-of-state and in-state businesses, the Second Circuit has opened the door to a Balkanization of regulatory requirements that jeopardize the efficient functioning of the interstate marketplace that our Constitution was designed to ensure.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION, IF NOT PROMPTLY OVERTURNED, WILL RESULT IN MAJOR DISRUPTION TO THE DISTRIBUTION OF MANUFACTURED GOODS

The Second Circuit candidly admits that the effect of its decision may well be to require manufacturers "to modify their production and distribution systems to differentiate between Vermont-based and non-Vermont based lamps." Pet. App. 9. It brushes aside this impact, however, blithely suggesting that any problem is simply the result of the "unwilling[ness]" of manufacturers to change their systems (*id.*), and that the solution is simply for lamp manufacturers to "arrange their production and distribution processes to produce labeled lamps solely for the Vermont market." (*Id.*) This simplistic suggestion wholly ignores the significant disruption that such a "modification" would cause to modern distribution systems, and the resulting impact on the efficient functioning of the interstate market.

The days when goods were produced in small plants and transferred directly to local markets have long since ended. Modern transportation and communications systems have given rise to complex, but highly efficient, business models that permit factories and distribution centers to be located at whatever point is most advantageous for business purposes, while still providing customers with prompt delivery of products as they are needed.[2] In today's economy, factories may be located anywhere in the country (or, in many instances, anywhere in the world). Siting decisions are not based on the anticipated point at which the goods will be sold, but rather on such factors as tax advantages, the

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[2] Modern distribution practices are described in some depth in *The Management of Business Logistics* (6th ed. 1996), by John J. Coyle, Edward J. Bardi and C. John Langley, Jr.

availability of a skilled work force, proximity to raw materials, availability and cost of reliable energy sources, availability and cost of transportation, and stability of political systems. The finished goods are typically packaged at the manufacturing plant or transferred to a separate packaging center. In some instances products that bear a seller's name and logo are not manufactured directly by the seller, so the seller may never touch or see the finished goods or their packaging before they are placed into interstate channels of distribution.

Once produced and packaged, products normally go through a number of intermediate distribution stations on their way to the ultimate retail outlet. Typically a large manufacturer will operate several of its own distribution centers, strategically situated to serve a wide multi-state area, which may handle a variety of goods produced by that manufacturer. Products are shipped by those distribution centers in response to orders from wholesalers or distribution centers of major retailers, many of which also serve a multi-state area. The final shipment to the individual retail outlet or commercial customer typically occurs when an order is received by the wholesaler or the retail distributor.[3]

The "unwilling[ness]" of the manufacturers of the mercury-containing lamps involved in this case to "modify" their processes so as to produce and distribute lamps solely for the Vermont market thus was not simply a matter of intransigence, or a reluctance to make relatively minor changes in their current practices. It was rather a reflection

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[3] The distribution processes for the principal manufacturers of mercury-containing lamps, including General Electric, Philips and Sylvania, were described in detail by the witness for Petitioner NEMA at the trial in this case. *See* JA 000020-26, 000249-267, 000304, 000617-621. Citations with the notation "JA" refer to items in the parties' Joint Appendix before the court of appeals.

of the fundamental fact that such a "modification" would be extraordinarily disruptive of their manufacturing and distribution systems, and would result in costs far higher than justified by the size of the small Vermont market. Indeed, petitioners estimated that the one-time cost of setting up a separate production and distribution line solely for lamps to be sold in Vermont would be over $8 million for General Electric alone, plus added annual costs of over $4.7 million.[4] For the entire industry, petitioners estimated a one-time conversion cost of over $13 million, plus recurring annual costs of over $16 million.[5] And these are simply the out-of-pocket costs. They do not even take into account the loss of efficiency to the overall manufacturing and distribution processes or the disruption to their operations, both of which have a major impact on their interstate businesses as a whole.[6]

Other members of EIA and the NAM have equally complex distribution systems, and would face equally severe dislocations if those systems had to be modified to accommodate state-specific labeling requirements.

For example, at least two EIA member companies are global manufacturers of consumer electronic products, such as televisions and audio equipment. These companies have numerous manufacturing facilities around the world. The manufacturing facilities are generally product-specific, rather than market-specific. Thus, a company may manufacture a particular type of product, such as televisions, in a facility in Mexico for global distribution. For the U.S. market, the

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[4] *See* JA 000296.

[5] *See* JA 000297- 000298.

[6] The same witness testified that if the manufacturers were instead to modify their production so as to affix the Vermont-required label to all of their mercury-containing lamps, the cost to the industry would be over $9 million. *See* JA 000280.

products are generally shipped from the manufacturing facilities to the companies' warehouses located throughout the United States. Products are often then shipped from the manufacturer's warehouse to distributor or customer warehouses, which in turn often serve several states. Thus, when a product leaves the manufacturer's warehouse, the manufacturer, and the customer itself, have no way of knowing where the product will ultimately be sold.[7]

The problems are not limited to manufacturers of consumer goods. For example, one of EIA's member companies is a large aerospace electronics manufacturer that has manufacturing facilities in four different states, and numerous service facilities throughout the United States. The company manufactures and packages its products at its four plants for nationwide sales, without any differentiation as to where the products might ultimately be sold. The products are either shipped directly to corporate customers, such as airline manufacturers, which may install the product in an aircraft located anywhere in the country, or to the company's own service centers, which generally serve a multi-state area. Thus, the manufacturer has no way of knowing at the time of manufacture and packaging where any individual electronic device will ultimately be sold or used.

If the Second Circuit decision is allowed to stand, there can be little doubt that other states, both in that Circuit and elsewhere, will view it as a "green light" to pursue labeling requirements that address their own preferred causes and

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[7] In addition, some customers may order particular products directly from the manufacturer's overseas manufacturing plant, and the customer may then import the products into the United States itself. In such cases, the manufacturer may not even know that the products are destined for the United States, much less the particular State in which they will ultimately be sold.

concerns. Indeed, Rhode Island and Maine have already enacted laws that require state-specific labeling of mercury-containing products.[8] In addition, several other states are currently considering similar labeling legislation. For example, Connecticut and Massachusetts are considering legislation that would require labeling of mercury-containing products and their packaging.[9] Similarly, California is considering legislation that would require all cathode ray tubes or devices, and the packaging containing such tubes or devices, to include a label approved by the State Department of Toxic Substances Control.[10] There is no assurance that the requirements imposed by one State will be consistent with those of other states.

In these circumstances, it is apparent that the Vermont labeling law is not simply an aberration. Unless this Court acts promptly to review the Second Circuit's decision, similar laws are clearly going to proliferate in other states. This will create major manufacturing and distribution problems for businesses—and yet those businesses will have no recourse to the Courts for review under the Commerce Clause unless the laws overtly discriminate between in-state and out-of-state businesses.

Current manufacturing and distribution systems have developed so as to take advantage of advances in technology, transportation and communications. When states enact laws that would require a major disruption in those systems, businesses should be entitled to a review of the constitutionality of such laws in which the burdens imposed on interstate commerce are weighed against the claimed local

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[8] 2001 R.I. Pub. Laws 318, R.I. Gen. Laws § 23 ch. 24.9; Me. Rev. Stat. Ann. tit. 38, § 1662 (2001).

[9] *See* Raised H.B. 5539, 2002 Gen. Assem., Feb. Sess. (Conn. 2002); House No. 4717, 2001 House of Representatives (Mass. Nov. 5, 2001).

[10] S.B. 1619, 2001-2002 Reg. Sess. (Cal. Feb. 21, 2002).

benefits, and the availability of less burdensome means of achieving the state's goals are taken into account. Those rights are denied by the Second Circuit's decision, to the serious detriment of American business and, ultimately, the consumers throughout the nation that they serve.

II. THE SECOND CIRCUIT'S DECISION SERIOUSLY UNDERMINES THE PROTECTION AFFORDED AMERICAN BUSINESS BY THE COMMERCE CLAUSE

From the perspective of American manufacturers, the Commerce Clause is one of the most important provisions of the U.S. Constitution.[11] It provides the assurance that goods, once produced, can be freely marketed throughout the United States, free from State and local laws that create excessive burdens on the interstate marketplace.

This Court's Commerce Clause jurisprudence has recognized that, to achieve its purpose, the protections of the Commerce Clause cannot be limited to the invalidation of state or local laws that discriminate between interstate and in-state businesses. Disruptions of the free interstate market can result just as surely from state and local laws that, while

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[11] The importance of the Commerce Clause cannot be overstated. Indeed, the concerns that underlay the Commerce Clause are among the principal reasons why the Constitution came into being. "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to take into consideration the trade of the United States; to examine the relative situations and trade of the said States [and] to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony. . . ." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949) (quotation and citation omitted); *see also* Joseph Story, *Commentaries on the Constitution of the United States* § 507 (1833) ("The want of [federal] power [to regulate commerce] was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the constitution.").

falling equally on both out-of-state and in-state businesses, nevertheless place burdens on interstate commerce that are enormous in relation to the local benefit sought to be served. Thus over fifty years ago, this Court in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), invalidated a state law regulating the length of trains, not because of any discrimination against interstate commerce, but because the law "impose[d] a serious burden on the interstate commerce conducted by" the railroads by "delaying it and by substantially increasing its cost and impairing its efficiency." *Id.* at 773, 779. Some fifteen years later, a state's effort to require a particular type of "mud flap" on trucks operated within the State was invalidated, even though there was no "element of discrimination against interstate commerce," because of the "great burden of delay and inconvenience on those interstate motor carriers" entering the State. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 525, 528-29 (1959). This "second tier" of Commerce Clause analysis was clearly articulated in this Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) ("*Pike*"), which stated the now-familiar principle that, "[even where a state or local] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it may still be unconstitutional in violation of the Commerce Clause if "the burden imposed on . . . [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

Application of the *Pike* text has been of crucial importance to the effective functioning of the interstate market-place. *See, e.g., Catto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995) (Minnesota statute prohibiting sale of petroleum-based sweeping products not discriminatory but burdens on interstate commerce must be weighed against "miniscule" public benefits of statute); *Lewis Bros. Co. v. Maurer*, 712 F. Supp. 645, 653 (S.D. Ohio 1989) (Ohio statute prohibiting use of word "butter" in package label

"applies evenhandedly to both in-state and out-of-state producers" but is nevertheless unconstitutional because local interests can be served by less restrictive measures); *Wallace v. Town of Palm Beach*, 624 F. Supp. 864, 870 (S.D. Fla. 1984) (local ordinance requiring employee identification cards is evenhanded "on its face" but nevertheless violates Commerce Clause because burden on interstate commerce is excessive in relation to legitimate local interests), *appeal dismissed*, 809 F.2d 1525 (11th Cir. 1987).

In all of those cases, the problem was not one of discrimination between interstate and intrastate businesses. Indeed, the courts in those cases found that there was in fact no discrimination. The problem was the *impact* of the laws on interstate commerce—which was no less serious simply because the laws applied to out-of-state and in-state businesses alike.

The law at issue in this case is a classic example of a law that places enormous burdens on interstate commerce. As described above, the mercury-containing products regulated under the Vermont labeling law are mass-produced in plants throughout the world, and are then generally shipped to central distribution centers that serve large regions of the United States. Because manufacturers do not ship these products directly to retailers, or to state-specific distribution centers, a manufacturer cannot predict whether any particular product will eventually end up in Vermont. Therefore, manufacturers do not have the option of simply labeling a particular batch of products intended for the Vermont market. And the cost of developing and implementing a separate production line and distribution system only for Vermont products, as the Second Circuit suggests should be done, would be prohibitive given the relatively small size of the Vermont market. *See* p. 7-8, *supra*. Moreover, as more states enact their own brand of labeling laws, each with different

requirements as to content and placement, these costs will rise exponentially.

The only practical alternative—to label all mercury-containing products, no matter where they may be sold, according to Vermont's requirements—would likely be cost-prohibitive. Billions of such products are manufactured and sold worldwide each year, and the costs of re-tooling production equipment to add a product and package label to each would be extremely high. *See* p. 8, *supra*. Moreover, this option would be feasible only so long as other states did not impose laws requiring different wording on the label of products sold or used in that State.

By any reasonable standard, these are serious burdens that are being imposed on the interstate commerce in mercury-containing lamps. Yet the Second Circuit refused *even to consider* whether those burdens are excessive in relation to the asserted local benefit—i.e., the education of consumers as to the proper disposal of such lamps—and whether those benefits could be achieved through less burdensome means (such as point-of-sale signs in retail stores).[12]

The Vermont labeling law is precisely the type of statute that should have been subjected to rigorous scrutiny under the *Pike* balancing test, weighing the burdens imposed on

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[12] Indeed, it appears that even if the Vermont statute were successful in educating consumers to dispose of mercury lamps as hazardous waste, rather than in the regular municipal waste stream, that would have little impact on the release of mercury into the environment. According to the U.S. Environmental Protection Agency's 1997 Mercury Study Report, available at *http://www.epa.gov/oar/mercury.html*, the major contributors of mercury emissions are utility, commercial and residential boilers. Landfills, where most municipal waste is disposed of, are insignificant sources of mercury emissions into the environment.

interstate commerce against the local benefits and evaluating the existence of less burdensome means of achieving the State's objectives. To the extent that the Second Circuit (and other Circuits that follow the same rationale) refuses to engage in this type of analysis in the absence of a showing of discrimination, it is depriving American business of a substantial measure of the Constitutional protection that they are entitled to receive under this Court's dormant Commerce Clause jurisprudence.

CONCLUSION

The petition for certiorari should be granted and the Second Circuit's decision should be reversed.

Respectfully submitted,

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